INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

SALLY L. BILDER, Individually, and as Sole Executrix of the Last Will and Testament of ROBERT M. BILDER, Deceased

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit in this case, rendered on cross-appeals below (Nos. 13,293 and 13,294).

OPINIONS BELOW

The findings of fact and opinion of the Tax Court are reported at 33 T. C. 155. (Appendix A, *infra,* pp. 47-55.) The opinion of the Court of Appeals (Appendix A, *infra,* pp. 12-45) is reported at 289 F. 2d 291.

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1961. (Appendix A, *infra*, p. 46.) The time for filing a petition for a writ of certiorari was extended, by order of Mr. Justice Brennan, to and including September 4, 1961. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED

Whether living expenses incurred by the taxpayer, Robert M. Bilder, for lodging for himself, his wife and small child during a trip to Florida prescribed for medical reasons are deductible medical expenses under Sec-213 of the Internal Revenue Code of 1954, rather than non-deductible personal living expenses under Section 262.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 213. MEDICAL, DENTAL, ETC., EXPENSES.

(a) *Allowance of Deduction.*—There shall be allowed as a deduction the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent (as defined in section 152)—

* * * * *

(e) *Definitions.*—For purposes of this section—
(1) The term "medical care" means amounts paid—

(A) for the diagnosis, cure, mitigation, treat-

ment, or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance), or

(B) for transportation primarily for and essential to medical care referred to in subparagraph (A).

* * * * *

(26 U.S.C. 1958 ed., Sec. 213.)

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

(26 U. S. C. 1958 ed., Sec. 262.)

Treasury Regulations on Income Tax (1954 Code):

SEC. 1.213-1. *Medical, Dental, Etc., Expenses.*—* * *

* * * * *

(e) *Definitions*—(1) *General.* * * *

* * * * *

(iv) Expenses paid for transportation primarily for and essential to the rendition of the medical care are expenses paid for medical care. However, an amount allowable as a deduction for "transportation primarily for and essential to medical care" shall not include the cost of any meals and lodging while away from home receiving medical treatment. For example, if a doctor

prescribes that a taxpayer go to a warm climate in order to alleviate a specific chronic ailment, the cost of meals and lodging while there would not be deductible. On the other hand, if the travel is undertaken merely for the general improve of a taxpayer's health, neither the cost of transportation nor the cost of meals and lodging would be deductible. If a doctor prescribes an operation or other medical care, and the taxpayer chooses for purely personal considerations to travel to another locality (such as a resort area) for the operation or the other medical care, neither the cost of transportation nor the cost of meals and lodging (except where paid as part of a hospital bill) is deductible.

* * * * *

STATEMENT

The undisputed facts found by the Tax Court are summarized in the opinion below as follows (Appendix A, *infra*, pp. 13-15):

In 1954, the taxpayer, Robert M. Bilder,[1] was engaged in the practice of law in Newark, New Jersey, and resided in a nearby town with his wife and three-year-old daughter. He was then 43 years old. He had earlier suffered four coronary occlusions resulting

[1] For convenience, in this petition Robert M. Bilder is denoted as "taxpayer." His wife, Sally L. Bilder, has also been a party in her individual capacity by reason of liability under joint tax returns. Robert M. Bilder died on June 9, 1961. The Court of Appeals, by order dated August 25, 1961, substituted Sally L. Bilder in her representative capacity as sole executrix of the estate of Robert M. Bilder.

in myocardial infarctions which restricted the flow of blood to his heart; the occlusions were suffered in the course of the disease of atherosclerosis.

An eminent heart specialist advised the taxpayer, in December, 1953, that he should spend the winter months in a warm climate as part of the treatment of his disease and in order to prevent further heart attacks. The taxpayer, his wife and infant daughter went to Fort Lauderdale, Florida, which afforded the warm climate advised by his heart specialist. He rented an apartment there between January 1, 1954, and March 24, 1954, at a rental of $1,500, which was less than the cost of a single room in a hotel. The apartment was in close proximity to a Fort Lauderdale hospital which had facilities to test the taxpayer's blood to determine the correct dosage of an anticoagulant drug known as Dicumerol. One of the few doctors in Florida competent to supervise the taxpayer's use of Dicumerol—then in limited use—practiced in Fort Lauderdale and the taxpayer was under his care.

The taxpayer also rented an apartment in Fort Lauderdale from December 15, 1954, to February 10, 1955, at a rental of $829 for the period. His wife and daughter accompanied him.

The taxpayer, in his 1954 and 1955 income tax returns, deducted as "medical care" expenses the respective Florida apartment rentals and $250 each year for transportation between Newark, New Jersey, and Fort Lauderdale. The Commissioner disallowed the stated deductions and the taxpayer resorted to the Tax

Court, which allowed the deductions claimed for transportation but only one-third of the apartment rentals, because of its view that "From the record we are unable to conclude that having his family in Florida with him was necessary as a part of the treatment of his disease." (Appendix A, *infra*, p. 55.)

Following the filing of the Tax Court's findings of fact and opinion on October 26, 1959, the taxpayer moved for leave to submit additional testimony on the issue of the medical necessity of having his wife share his apartment with him in Florida, and appended thereto an affidavit of his medical expert to that effect. The Tax Court denied the taxpayer's motion on November 6, 1959, and subsequently, on December 29, 1959, filed its decision.

On the appeals of both the Commissioner and the taxpayers, the majority of the Court of Appeals held that the full rental of the apartment was deductible as a medical expense; Judge Hastie dissented. (Appendix A, *infra*, pp. 39-45.)

REASONS FOR GRANTING THE WRIT

1. As appears from the appended opinions of the two courts, the Third Circuit and the Second Circuit have rendered directly conflicting decisions on an important question of tax law. In the instant case, the Third Circuit has held that a person, afflicted with the disease of atherosclerosis and suffering from heart attacks, who spent the winter months in Florida on the advice of his doctor as part of the medical treatment for the disease and to prevent the attacks, may deduct the costs of a winter apartment in Florida.

In *Carasso* v. *Commissioner*, decided July 14, 1961 (Appendix B, *infra*, pp. 56-62), the Second Circuit held that a person convalescing from a major stomach operation may not deduct the cost of hotels and meals for himself and his wife during a convalescent stay in Bermuda undertaken solely for medical reasons, ruling that such amounts are non-deductible personal living expenses. The Second Circuit characterized the instant case as involving (Appendix B, *infra*, p. 61) "substantially similar facts and the identical legal issue presented by the" case before it and concluded (Appendix B, *infra*, pp. 61-62) "that the relevant statutes, and the legislative history surrounding them, support Judge Hastie's interpretation" expressed in dissent. The conflict was expressly recognized.[2]

2. Under Section 23 (x) of the 1939 Code,[3] the deductible expenses of medical care were defined to include "amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease". Section 24(a)(1) provided that "[i]n computing net income no deduction shall in any case be allowed in respect of—(1) [p]ersonal, living, or family expenses, except extraordinary medical expenses deductible under Section 23(x) * * *". Section 23(x) was interpreted to

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[2] The court below affirmed the interpretation of a single judge (Withey, J.) (Appendix A, *infra*, pp. 47-55.) However, in *Carasso* v. *Commissioner*, 34 T. C. 1139, Appendix B, *infra*, pp. 62-73, in a reviewed decision (opinion by Raum—J.; Withey and Pierce, JJ., dissenting) the Tax Court disapproved its earlier decision in the instant case and in turn, as already stated, the Second Circuit affirmed the Tax Court's later view.

[3] Subsection (x) was added to Section 23 of the 1939 Internal Revenue Code by Section 127(a), Revenue Act of 1942, c. 619, 56 Stat. 798.

include the costs of transportation and non-hospital meals and lodging incurred primarily for and essential to medical care. *Stringham* v. *Commissioner*, 12 T. C. 580, affirmed, 183 F. 2d 579 (C.A. 6th); Rev. Rul. 55-261, 1955-1 Cum. Bull. 307.

In contrast, Section 262 of the 1954 Code (*supra*, p. 3) precludes the deduction of living expenses in the absence of any express provision. The 1954 Code retained the prior definition of medical care in Section 213(e)(1)(A), but a new provision was added in Section 213(e)(1)(B) to allow expressly the deduction of amounts paid "for transportation primarily for and essential to" such medical care. The Committee Reports in both Houses then stated (H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 30, A60 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4054, 4197); S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 35, 219-220 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4666, 4856)):

> Subsection (e) defines medical care to mean amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of diseases or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance), or for transportation primarily for and essential to medical care. The deduction permitted for "transportation primarily for and essential to medical care" clarifies existing law in that it specifically excludes deduction of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a patient must go to Florida in

> order to alleviate specific chronic ailments and to escape unfavorable climatic conditions which have proven injurious to the health of the taxpayer, and the travel is prescribed for reasons other than the general improvement of a patient's health, the cost of the patient's transportation to Florida would be deductible but not his living expenses while there. However, if a doctor prescribed an appendectomy and the taxpayer chose to go to Florida for the operation not even his transportation costs would be deductible. The subsection is not intended otherwise to change the existing definitions of medical care, to deny the cost of ordinary ambulance transportation nor to deny the cost of food or lodging provided as part of a hospital bill.

It thus appears that Congress intended that the costs of lodging, in a case identical to the case at bar, would not be deductible medical expenses. The majority of the court below has held that this express declaration of intent is to be disregarded, on the grounds that the statutory language used by Congress unambiguously authorizes the deduction in question, the Committee Reports are confusing, and the specific declaration of Congressional intent found in the reports is overridden by the general policy favoring medical deductions. We think that none of these grounds is maintainable. The statutory language is not so clear as to preclude resort to the Committee reports for clarification of its meaning; the clarification found in the Committee reports is definitive; and the overriding policy consideration is

that Congress, not the courts, fixes the extent of allowable deductions for medical and other expenses. We submit that the Second Circuit and Judge Hastie, dissenting below, have correctly held that the clear declaration of Congressional purpose set forth in the Committee reports is binding upon the courts in determining the meaning of the language adopted by Congress.

3. The conflict between the two decisions plainly calls for resolution by this Court. The court below invalidated Treasury Regulations which properly construed the statutory language. (Treasury Regulations on Income Taxes (1954 Code), Section 1.213-1(e)(1)(iv), *supra*, p. 3.) Although a small amount is involved in each case, the issue is one of common occurrence and affects many thousands of individuals as well as the general administration of the revenue laws.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER, 1961

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,293

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
v.
ROBERT M. AND SALLY L. BILDER

No. 13,294

ROBERT M. AND SALLY L. BILDER,
Petitioners
v.
COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

Argued October 20, 1960

Before McLAUGHLIN, KALODNER and HASTIE,
Circuit Judges.

OPINION OF THE COURT

(Filed April 7, 1961)

By KALODNER, *Circuit Judge.*

Are rental payments for an apartment during a winter's stay in Florida, incurred, as the Tax Court of the United States found, "as a medical necessity and

as a primary part of necessary medical treatment of a disease from which petitioner [taxpayer] was and still is suffering", deductible as a "medical expense" under Section 213 of the Internal Revenue Code of 1954?

That is the primary question presented by the Commissioner of Internal Revenue's petition for review (No. 13,293) of the Decision of the Tax Court of the United States [1] which answered it in the affirmative.

The issue is novel in the sense that it has never been decided by the appellate courts of the United States. It must immediately be noted that the Commissioner concedes that under the "medical expense" provisions of Section 23(x) of the Internal Revenue Code of 1939, as added in 1942, predecessor to Section 213 of the 1954 Code, the rental payments at issue were allowable deductions. As will subsequently be developed, the Commissioner contends that the effect of the 1939 Code provisions was changed by the addition of Section 213(e)(1)(B) so as to narrow "the scope of the medical deduction so as to allow only transportation expenses for travel prescribed for health", and to preclude rental expenses.

The petition for review (No. 13,294) of Robert M. Bilder ("taxpayer") [2] presents a secondary issue as to whether the Tax Court correctly limited his rental deduction, as will subsequently appear.

The critical facts as found by the Tax Court and not here disputed may be summarized as follows:

In 1954 taxpayer was engaged in the practice of law in Newark, New Jersey. He resided in a nearby town with his wife and three-year old daughter. He was

[1] The decision of the Tax Court is reported at 33 T.C. (1960).

[2] Mr. Bilder's wife, Sally, is also a petitioner here, but solely because she filed a joint return with her husband.

then 43 years old. He had earlier suffered four coronary occlusions resulting in myocardial infarctions which restricted the flow of blood to his heart. The occlusions were suffered in the course of the disease of atherosclerosis which afflicted taxpayer.

"One of the most eminent heart specialists in the United States if not the world" advised taxpayer in December 1953 that he spend the winter months in a warm climate as part of the treatment of his disease and in order to prevent further heart attacks.[3] Taxpayer, his wife and infant daughter went to Fort Lauderdale, Florida which afforded the warm climate advised by his heart specialist. He rented an apartment there between January 1, 1954 and March 24, 1954 at a rental of $1500.00, which was less than the cost of a single room in a hotel. The apartment was in close proximity to a Fort Lauderdale hospital which had facilities to test taxpayer's blood to determine the correct dosage of an anticoagulant drug known as

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[3] On the score of the medical advice given to taxpayer to winter in Florida the Tax Court made these factual findings:

"This advice was given him because of his personality characteristics. He is and was at the time the advice was given a hyperkinetic person with an unusual inner stress and tension. To confine him either at home or a hospital in the relatively cold climate of New Jersey through the winter months would have resulted in danger to his health from two sources. Such extended inactivity would have increased his inner stress and tension, which are medically accepted as tending to cause the recurrence of heart attacks in one who has previously suffered one or more such incidents. Mild exercise of the type not available while confined to home or hospital is required for such a person and was for petitioner in order that new vascular passages for blood to the heart may more readily and quickly develop. . . .

". . . *The primary objective of all his treatment and the advice given incidental thereto was the prevention of further myocardial infarction with resulting impairment or destruction of the functioning of his heart, thus prolonging his life. . . .*" (emphasis supplied). 33 T.C. at .

Dicumerol. One of the few doctors in Florida competent to supervise taxpayer's use of Dicumerol—then in limited use—practiced in Fort Lauderdale and taxpayer was under his care.

Taxpayer also rented an apartment in Fort Lauderdale from December 15, 1954 to February 10, 1955 at a rental for the period of $829.00. His wife and daughter accompanied him.

Taxpayer in his 1954 and 1955 income tax returns deducted as "medical care" expenses the respective Florida apartment rentals and $250.00 each year for transportation between Newark, New Jersey and Fort Lauderdale. The Commissioner disallowed the stated deductions and taxpayer resorted to the Tax Court which allowed the deductions claimed for transportation but only one-third of the apartment rentals, because of its view that "From the record we are unable to conclude that having his family in Florida with him was necessary as a part of the treatment of his disease."

Following the filing of the Tax Court's Findings of Fact and Opinion on October 26, 1959, taxpayer moved for leave to submit additional testimony on the score of the "medical necessity" of having his wife share his apartment with him in Florida, and appended thereto an affidavit of his medical expert to that effect. The Tax Court denied taxpayer's motion on November 6, 1959 and subsequently, on December 29, 1959 filed its decision.

Taking first the issue presented by the Commissioner's petition for review as to whether rental payments of the nature here involved are allowable deductions as a "medical expense" under Section 213 of the Internal Revenue Code of 1954:

It may be noted, preliminarily, that the Commissioner does not challenge the Tax Court's factual finding that it was necessary for the "medical care" of taxpayer that he winter in Florida. Nor does the Commissioner dispute that under Section 23(x) of the 1939 Revenue Code "non-hospital meals and lodging, incurred primarily for and essential to medical care" were allowable as "expenses of medical care".

The crux of the Commissioner's position, as he puts it, "is essentially that . . . lodging expenses are nondeductible personal living expenses, and that Section 213 of the 1954 Code . . . by expressly authorizing a deduction for transportation expenses, necessary to medical care, excludes allowance for lodging or meals." Section 23(x) of the 1939 Code, it may be noted, did not make specific provision for the deduction of transportation expenses but they were allowed by judicial construction of Section 23(x), with the acquiescence of the Commissioner.

The provisions of Section 23(x) of the 1939 and Section 213 of the 1954 Code, other than with respect to the deductibility of transportation expenses, are identical. To afford a ready comparison they are set forth in adjacent columns as follows:

1939 Code

"§ 23. Deductions from gross income. In computing net income there shall be allowed as deductions:

* * * * * *

"(x) Medical, dental, etc., expenses. Expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse or a dependent. . . .

* * * * * *

"The term 'medical care,' as used in this subsection shall include amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance). . . ."

1954 Code

"§ 213. Medical, dental, etc., expenses

"(a) Allowance of deduction.—There shall be allowed as a deduction the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent. . . .

* * * * * *

"(e) Definitions.—For purposes of this section—

(1) The term 'medical care' means amounts paid—

(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance), or

(B) for transportation primarily for and essential to medical care referred to in subparagraph (A)."

The Commissioner's contention is that "the express proviso [subparagraph (B)] allowing only transportation costs *suggests* that Congress intended to limit the deduction for expenses of travel to exclude the costs of meals or lodging as allowable expenses includible in 'medical care'." (emphasis supplied).

In apparent recognition that he is leaning on the most slender of reeds in this respect, the Commissioner further resorts to the House and Senate committee reports which state that subparagraph (B) "clarifies existing law in that it specifically excludes the deduction of any meals or lodging while away from home receiving medical treatment." It may be added that

Treasury Regulations on Income Taxes (1954 Code), Section 1.213-1(e)(1)(iv) so provide:[4]

At this juncture it should be stated that the Tax Court in the instant case refused to consider the House and Senate reports stating:

> "In view of the clarity of the wording of section 213 of the 1954 Code, we see no reason to resort to congressional history for its meaning."

To the foregoing must be added that the Tax Court in Carasso v. Commissioner, 34 T.C. (1960), reviewed by the Court, with one judge concurring in the result and two dissenting, "disapproved" of its failure to examine legislative history in the instant case. The Tax Court, however, did not disapprove or repudiate the allowance of transportation and partial apartment rental made here, indicating that it construed the legislative history to permit allowance of living expenses in proper cases. That indication is buttressed by the fact that in disallowing living expenses in *Carasso* to a tax-

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[4] The Treasury Regulations read in relevant part as follows:

"(iv) Expenses paid for transportation primarily for and essential to the rendition of the medical care are expenses paid for medical care. However, an amount allowable as a deduction for 'transportation primarily for and essential to medical care' shall not include the cost of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a taxpayer go to a warm climate in order to alleviate a specific chronic ailment, the cost of meals and lodging while there would not be deductible. On the other hand, if the travel is undertaken merely for the general improvement of a taxpayer's health, neither the cost of transportation nor the cost of meals and lodging would be deductible. If a doctor prescribes an operation or other medical care, and the taxpayer chooses for purely personal considerations to travel to another locality (such as a resort area) for the operation or the other medical care, neither the cost of transportation nor the cost of meals and lodging (except where paid as part of a hospital bill) is deductible."

payer who, on his doctor's advice, following two operations in which the major portion of his stomach was removed, took a nine-day trip to Bermuda for convalescence, the Tax Court expressly stated *"We express no opinion as to whether meals and lodging expenses might be deductible in other circumstances."* (emphasis supplied.)

The sum of taxpayer's view is that Section 213(e)(1)(A) defines "medical care" in the same terms as Section 23(x) and since the latter permitted deductions for lodging expenses (apartment rental here), Congress, by re-enacting its language into Section 213(e)(1)(A), provided for the continuance of such deductions; further, had Congress intended to make lodging expenses (and meals) non-deductible in the 1954 Code it could have so specified in Section 213, and finally, the congressional committee reports "contain ambiguities and, if literally applied, produce absurd results."

This summation of the views of the parties may appropriately be made at this juncture:

Both agree, as earlier stated, that Section 23(x) of the 1939 Code permitted allowance of rental payments as "medical care" in proper cases.[5] Further, both agree that Section 213(e)(1)(A) of the 1954 Code defines "medical care" in the same terms as Section 23(x) of the 1939 Code. The Commissioner, however, is of the view that "on its face" the additional definition of transportation costs as "medical care" in subparagraph (B) of Section 213(e)(1) "suggests" a statutory ex-

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[5] Edward A. Havey, 12 T.C. 409 (1949); L. Keever Stringham, 12 T.C. 580 (1949), reviewed by the Tax Court, acq. 1950-2 Cum. Bull 4, aff'd 183 F.2d 579 (6th Cir. 1950); Embry's Estate v. Gray, 143 F. Supp. 603 (W.D. Ky. 1956), appeal dismissed on motion of appellant-District Director of Internal Revenue, 244 F.2d 718 (6 Cir. 1957).

clusion of lodging and meal[6] expenses incurred while receiving "medical care" away from home (except where paid as a hospital bill). He further urges that the House and Senate committee reports relating to subparagraph (B)[7] "expressly" state that it makes such an exclusion, and that the impact of the legislative

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[6] The question as to allowability of deductions for meals is not here in issue since taxpayer made no claim with respect to them.

[7] In both the House and Senate Reports on the 1954 Code, the following appears (H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 30, A60 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4197); S. Rep. 1622, 83d Cong., 2d Sess., pp. 35, 219-220 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4856)):

> "Subsection (e) defines medical care to mean amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of diseases or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance), or for transportation primarily for and essential to medical care. The deduction permitted for 'transportation primarily for and essential to medical care' clarifies existing law in that it specifically excludes deduction of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a patient must go to Florida in order to alleviate specific chronic ailments and to escape unfavorable climatic conditions which have proven injurious to the health of the taxpayer, and the travel is prescribed for reasons other than the general improvement of a patient's health, the cost of the patient's transportation to Florida would be deductible but not his living expenses while there. However, if a doctor prescribed an appendectomy and the taxpayer chose to go to Florida for the operation not even his transportation costs would be deductible. The subsection is not intended otherwise to change the existing definitions of medical care, to deny the cost of ordinary ambulance transportation nor to deny the cost of food or lodging provided as part of a hospital bill."

The Senate Report, *supra* (S. Rep. 1622, p. 35 3 U.S.C. Cong. & Adm. News (1954) 4666) recommending enactment of the language added in the governing statute also explained:

> "A new definition of 'medical expenses' is provided which allows the deduction of *only transportation expenses for travel prescribed for health, and not the ordinary living expenses incurred during such a trip.*" (Commissioner's emphasis).

history requires us to construe (B) to effect such a result.

We need not be detained by the Commissioner's view that subparagraph (B) "on its face" "suggests" the limitation which he urges, or a congressional intent to effect it. Indeed "on its face," subparagraph (B), by its explicit terms, extends the deduction allowances for "medical expenses" to include "transportation primarily for and essential to medical care referred to in subparagraph (A)."

That brings us to the Commissioner's contention that the legislative history of subparagraph (B) requires a judicial construction that it effects the limitation which he urges.

Since in our view there is nothing in the terms of (B) which effects the limitation urged, the sum total of the Commissioner's position is that what is dispositive of the issue is not what the statute provides but what the legislative history says; otherwise stated, a statute can be nullified to the extent of repeal by its legislative history.

The Commissioner has not cited to us any precedent for his concept on this score nor has an exhaustive research on our part disclosed any judicial support for it.

The Supreme Court has time and again had occasion to consider vexing problems involving statutory construction. Earlier decisions indicated that where the terms of a statute are clear and unambiguous there is no requirement to consider legislative history in their construction, giving rise to what has been called the "plain-meaning rule."[8] That "rule" however has

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[8] United States v. Hartwell, 6 Wall. 385, 396 (1868) where it was said: "If the language [of the statute] be clear it is conclusive. There can be no construction where there is nothing to construe. . . ." To the same effect see United States v. Shreveport Grain & El. Co.,

given way in recent years to the present teaching that legislative history will be examined by the courts "... to see whether that [it] raises such doubts that the search for meaning should not be limited to the statute itself." Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 444 (1955).[9] In Alaska v. American Can Co., 358 U.S. 224, 226-27 (1959) it was said that courts will take "judicial notice" of legislative history.

We come now to consideration of the legislative history of subparagraph (B) and its asserted impact on (B) and the related provisions of Section 213.

Applicable to such consideration are these well-settled principles of statutory construction.

"Like other extrinsic aids to construction their [legislative history] use is to '*solve*, but not to *create* an ambiguity' ", United States v. Shreveport Grain & El. Co., 287 U.S. 77, 83 (1932).

Legislative history of a statute may not be taken as giving to it "a meaning not fairly within its words", St. Louis, I.M. & S. Ry. v. Craft, 237 U.S. 648, 661 (1915); nor add new terms to it, United States v. Shreveport Grain & El. Co., *supra*.

"In expounding a statute, we must . . . look to the provisions of the whole law, *and to its object and policy,*" United States v. The Heirs of Boisdoré, 8 Howard 113, 122 (1850); a construction *"that would produce*

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287 U.S. 77, 83 (1932) where it was said: "In proper cases, such reports [legislative] are given consideration in determining the meaning of a statute, but only where that meaning is doubtful."

[9] In Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943) it was said: "But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on "superficial examination".' *United States* v. *American Trucking Assns.*, 310 U.S. 534, 543-44. See also *United States* v. *Dickerson*, 310 U.S. 554, 562."

incongruous results" is to be avoided, Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 286 (1956). (emphasis supplied).[10]

"The long and well-settled construction" of an act, plus its reenactment without change of "the established construction", are "most persuasive indications" that the judicial construction "has become part of the warp and woof of the legislation", Francis v. Southern Pacific Co., 333 U.S. 445, 450 (1948).

Construction of statutes, which would make them a "dead letter" are not favored, Gemsco, Inc. v. Walling, 324 U.S. 244, 255 (1945); nor are repeals by implication, FTC v. A.P.W. Paper Co., 328 U.S. 193, 202 (1946).

"[L]iberalizations of the law in the taxpayer's favor . . . begotten from motives of public policy, . . . are not to be narrowly construed", Helvering v. Bliss, 293 U.S. 144, 151 (1934).

Remedial statutes should be construed in favor of those intended to be benefited, Helvering v. Bliss, *supra;* Hollander v. United States, 248 F.2d 247, 251 (2 Cir. 1957).

Prefacing application of the principles stated we will direct our attention to the public policy evidenced in the enactment of the initial legislation making provision for deduction of "medical care" expenses.

Section 23(x) of the 1939 Code was added to that Code by Section 127(a) of the Revenue Act of 1942.

The Senate Finance Committee Report (S.Rep. No. 1631, 77th Cong. 2d Sess.) outlined the purpose of Section 23(x) as follows at page 6:

> "This allowance is recommended in consideration of the heavy tax burden that must be borne by indi-

[10] Cited with approval and applied in NLRB v. Red Lion Oil Co., 352 U.S. 282, 288 (1957).

viduals during the existing emergency *and of the desirability of maintaining the present high level of public health and morale*";

and at pages 95-96:

"The term 'medical care' is *broadly* defined to include amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. It is not intended, however, that a deduction should be allowed for any expense that is not incurred primarily for the prevention or alleviation of a physical or mental defect or illness." (emphasis supplied).

The Tax Court and the United States district courts and courts of appeals, as earlier stated, construed Section 23(x) to permit deductions of transportation, lodging and meal costs as "medical expenses" in proper cases, and the Commissioner, in Treasury Regulations 111, Sec. 29.23(x)-1, accorded with these decisions.

Moreover, in Revenue Ruling 55-261, 1955-1 Cum. Bull. 307, the Commissioner expressly recognized the deductibility under Section 23(x) of costs of travel, meals and lodging incurred primarily for and essential to "medical care".

The foregoing establishes that the entire legislative concept of "medical care" allowances as provided by the amended 1939 Code was based on a broad public policy—"the desirability of maintaining the present high level of public health and morale", and that the courts and the Commissioner gave vitality to the public policy.

That the public policy stated prevailed when the 1954 Code [11] was under consideration is evidenced by the fact

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[11] The public policy with respect to deductibility of "medical expenses" has been expanded in sweep by amendments to the 1954

that it doubled the ceiling of deductible "medical expenses" to $2,500 per person and $10,000 per family and reduced the prevailing deduction for expenses only in excess of five percent of gross income to three percent of gross income.

It is significant that the Undersecretary of the Treasury (Marion B. Folsom), when he appeared before the Senate Committee on Finance at a hearing to consider the 1954 Code "medical expense" provisions, submitted a document in which he called attention to the changes above mentioned and stated as to them and subparagraph (B) as follows:

> "Overall effect of proposed changes is to *liberalize and extend relief in real hardship situations due to heavy medical expense but curb deductions* of ordinary or luxury living expenses in *guise of medical costs.*" (emphasis supplied).

The document set forth clearly demonstrates that the draftsman and sponsor (the Treasury Department) of subparagraph (B) conceived its design, intent, and content to effect a limitation only of allowance "of ordinary or luxury living expenses *in guise of medical costs*" (emphasis supplied). Nothing was said in the document which would warrant its interpretation of subparagraph (B) as precluding allowance of living expenses incurred, as the Tax Court found they were in the instant case, "as a medical necessity and as a

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Code since its enactment. In 1958, subsection (g) was added to Section 213. It increased from $2,500 to $15,000 the maximum allowance for "medical expenses" where taxpayer has attained the age of 65 and is disabled, and made similar provision with respect to his disabled spouse of the same age. In 1960, subsection (a) of Section 213 was amended to permit, within established limitations, "medical expenses" of dependent parents, who had attained the age of 65, of either or both taxpayers, without application of the excess of 3 percent of gross income proviso.

primary part of necessary medical treatment of a disease from which petitioner [taxpayer] was and still is suffering."

It is a fair assumption that the congressional committees acted on the premise asserted by the Treasury Department in sponsoring subparagraph (B) although in their reports they failed to advert to that premise, namely, "curb" deductions "in guise of medical costs", and instead used sweeping terms which encompassed living expenses while away from home even though they were incurred "as a medical necessity and as a part of necessary medical treatment."

The committee reports are ambiguous when they state that "The deduction permitted for 'transportation primarily for and essential to medical care' *clarifies existing law* in that it specifically excludes deduction of any meals and lodging while away from home receiving medical treatment", in view of the fact that the courts and the Commissioner had concurred in the construction of "existing law" (Section 23(x)) as permitting allowance of such expenses. (emphasis supplied). The ambiguity is emphasized by the fact that Congress in enacting the "medical care provisions of the 1954 Code (Section 213(e)(1)(A)) used language identical with that in the "medical care" provisions of the 1939 Code (Section 23(x)), and it must be assumed to have had knowledge of the unanimous judicial and administrative construction of Section 23(x).

Where there is unanimity in the construction of the terms of a statute it is an anomaly to say that it requires clarification.

The Senate committee report can scarcely be said to be helpful in construing subparagraph (B) to which it relates. It makes this statement with reference to subparagraph (B):

"A *new* definition of 'medical expenses' is pro-

vided which allows the deduction of only transportation expenses for travel prescribed for health, and not the *ordinary living expenses* incurred during such a trip." (emphasis supplied).

A reading of subparagraph (B) fails to disclose the slightest basis for the committee report statement that it provides "a new definition of 'medical expenses'" which precludes allowance of "ordinary living expenses" in travel prescribed for health.

Subparagraph (B) merely adds, in the conjunctive, to the category of "medical care" defined in subparagraph (A), "amounts paid"—

> "for transportation primarily for and essential to medical care referred to in subparagraph (A)".

What was said in the Senate committee report concerning "ordinary living expenses" makes for confusion and not for clarification.

"Ordinary living expenses" have never been regarded as deductible medical expenses. The 1939 Code was construed by the courts to permit deduction only of those living costs which could be identified as "extraordinary" because they were incurred as "a medical necessity and as a primary part of necessary medical treatment." The case books abound with instances, decided under the 1939 Code, where living expenses were not allowed where the travel was not a part of "medical care", and were recognized to be "in guise of" such care.

Treasury Regulations 29.23(x)-1 relating to Section 23(x), consistent with judicial construction, provided in applicable part as follows:

> "Allowable deductions under section 23(x) will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or men-

tal defect or illness. Thus, payments for . . . *travel primarily for and essential to the rendition of the medical services or to the prevention or alleviation of a physical or mental defect or illness, are deductible.*" (emphasis supplied).

It should be stressed that subparagraph (A) of Section 213(e)(1) is the counterpart of the 1939 Code provisions under which living expenses were allowed when they were part of "medical care." The legislative history of Section 213 makes no reference to subparagraph (A) nor has the Commissioner made reference here to that subparagraph despite the fact that subscription to his view of the impact of the legislative history would operate to nullify it as far as travel allowance (other than transportation expense) is concerned.

The Commissioner's insistence that we are required to give a literal interpretation to the phrase "ordinary living expenses" in the legislative committee reports runs counter to interpretations which he has made of this phrase in the Treasury Regulations relating to Section 213.

For example, a literal interpretation of the committee reports would require disallowance of the "cost of food and lodging" except when paid *"as part of a hospital bill"*. (emphasis supplied).

Treasury Regulations 1.213-1(e)(v), however, provide that allowance may be made for meals and lodging "in an institution other than a hospital", such as "a special school for a mentally or physically handicapped individual", or a "home for the aged" where "medical or nursing attention" is accorded.

"The extent to which expenses for care in an institution other than a hospital shall constitute medical care", says the Regulations cited, "is primarily a question of fact which depends upon the condition of the

individual and the nature of the services he receives (rather than the nature of the institution)".

The foreseeable circumstances that at a given time and a given place overcrowding in hospital or institutions would preclude use of their facilities and necessitate non-hospital and non-institutional shelter and meals in a private home, hotel or apartment, does not seem to have been considered by the Commissioner. Nor has he given consideration to the fact, of which judicial notice may be taken, that hospital and institutional costs are so high as to be prohibitive to a large percentage of those in need of "medical care".

In considering institutional care "other than a hospital" the Regulations enunciate the criteria that "The extent to which expenses for care . . . shall constitute medical care is primarily a question of fact which depends upon the condition of the individual and the nature of the services he receives (rather than the nature of the institution)". That criteria was emphasized by the Courts, and the Commissioner, in applying Section 23(x), and if the Commissioner's construction of the impact of the legislative history on the 1954 Code provisions permits his inclusion of non-hospital care, providing it is institutional in nature, such history cannot logically be said to bar its application in private facility cases, such as the apartment involved in the instant case.

On this score it must be noted that the Tax Court in the instant case made this specific factual finding:

> "Their sojourns [taxpayer and his wife] in Fort Lauderdale during the years at issue were not vacations; *they were taken as a medical necessity and as a primary part of necessary medical treatment of a disease* from which petitioner [taxpayer] was and still is suffering." (emphasis supplied).[12]

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[12] 33 T.C. at ——.

This factual finding is not disputed by the Commissioner.

It may be interposed that the Commissioner's position here is inconsistent. He has formerly acquiesced in this case to the Tax Court's holding that taxpayer's transportation expenses are deductible [13] and indicated non-acquiescence with its ruling making partial allowance of apartment rental.[14] It is true that he premises his position on legislative history but realistically if it was necessary for taxpayer to go to Florida as "medical care" it was equally necessary as part of that "medical care" that he receive shelter while he was there.

The Commissioner's position calls to mind the old nursery rhyme:

> Mother, may I go out to swim?
> Yes, my darling daughter:
> Hang your clothes on a hickory limb
> But don't go near the water.

What has been said brings us to the application here of the earlier stated principles of statutory construction.

To begin with, the impact of legislative materials must be evaluated in the light of the whole legislative scheme, the purpose sought to be achieved and the particular statutory provisions under scrutiny.

As was said in Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951) where legislative history was considered,

> "[T]he fair interpretation of a statute is often 'the art of proliferating a purpose', . . . revealed

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[13] 1960 Int.Rev. Bull. No. 16, at 9.
[14] 1960 Int. Rev. Bull. No. 33, at 7.

more by the demonstrable forces that produced it than by its precise phrasing."

In Ozwa v. United States, 260 U.S. 178, 194 (1922) the Supreme Court pointed out that in construing the express terms of a statute, *if* "by giving words their natural significance . . . this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, *sacrificing, if necessary, the literal meaning in order that the purpose may not fail.*" (emphasis supplied).

It follows, of course, if in the construction of the express terms of a statute we must "give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail", that language used in legislative history must be subjected to a similar test, and its "literal meaning" sacrificed "in order that the purpose" of the legislation "may not fail".

In the instant case, as has already been pointed out, the "medical expense" provisions of the 1954 Code evidence a broad public policy to maintain "the present high level of public health and morale" and the statute is clearly remedial in nature.[15] Such a statute, effecting "liberalizations of the law in the taxpayer's favor . . . begotten from motives of public policy . . ." is not only "not to be narrowly construed" but is to be broadly construed in the taxpayer's favor.[16]

Assuming, arguendo, that the "literal meaning" of the legislative history here is what the Commissioner

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[15] Hollander v. Commissioner, 219 F.2d 934 (3 Cir. 1955).
[16] Helvering v. Bliss, 293 U.S. 144, 151 (1934).

says it is, that "meaning" must be "sacrificed", under the Supreme Court's teaching, in order that "the policy" of Section 213 may not be frustrated and that its "purpose may not fail."

Moreover, since the Commissioner's view of the effect of the legislative history, if subscribed to, would require a construction which would make it "a dead letter", it is not to be "favored".[17]

Again, the substance of the Commissioner's contention that the legislative history adds "new terms to the statute" must be rejected under the settled rule that legislative history of a statute may not be taken as giving it "a meaning not fairly within its words" [18] nor add new terms to it.[19]

In our view the most that can be said of the legislative history here is that it creates an ambiguity with respect to the statutory provisions and that being so it cannot be availed of under the teaching that the use of legislative history is to "*solve*, but not not to *create* any ambiguity." [20] The least that can be said of the legislative history is that if it has the impact on Section 213 urged by the Commissioner it would effect a construction of the statute that "would produce incongruous results" and that, we have been told, is to be avoided.[21]

Under the holding in Francis v. Southern Pacific Co., *supra*, since Section 213 (a),(e)(1)(A) of the 1954 Code is a re-enactment of Section 23(x) of the 1939 Code, and the courts (and the Commissioner) over a twelve year period had construed Section 23(x) to

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[17] Gemsco, Inc. v. Walling, 324 U.S. 244, 255 (1945).

[18] St. Louis, I.M. & S. Ry. v. Craft, 237 U.S. 648, 661 (1915).

[19] United States v. Shreveport Grain & El. Co., 287 U.S. 77, 83 (1932).

[20] Ibid.

[21] Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 286 (1956).

permit allowance of lodging and meals as "medical expenses" where they were incurred as "medical care", "the long and well-settled construction" of Section 23(x), plus its re-enactment without change of "the established construction" provide "most persuasive indications" that the judicial construction "has become part of the warp and woof" of Section 213.

What the Commissioner is really urging here is the repeal "by implication", by the legislative history, of subparagraph (A) of Section 213 to the extent that it, as the counterpart of Section 23(x), permitted allowance of lodging and meals as "medical expenses" in proper cases. The ready answer is that repeals by implication are not favored,[22] and the applicable rule is that "where a general policy of government has been well established by statutes and recognized in court decisions, 'a clear expression of the intention of Congress' is required to justify a reversal. Ex parte Crow Dog, 1883, 109 U.S. 556, 572, 3 S.Ct. 396, 27 L.Ed. 1030."[23]

We have already expressed the view that the legislative history here is ambiguous and that on that score what was said in FCC v. Columbia Broadcasting System, 311 U.S. 132 (1940) seems particularly appropriate.

It was there stated (pp. 136-37):

> "What was said in Committee Reports, and some remarks by the proponent of the measure in the Senate, are sufficiently ambiguous . . . to invite mutually destructive dialectic, but not strong

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[22] FTC v. A.P.W. Paper Co., 328 U.S. 193, 202 (1946).

[23] Commissioner v. Rivera's Estate, 214 F.2d 60, 62-63 (2 Cir. 1954). To the same effect see Fawcett v. Commissioner, 149 F.2d 433, 435 (2 Cir. 1945).

> enough either to strengthen or weaken the force of what Congress has enacted."[24]

With reference to the Senate and House committee reports here, viewing them in the most favorable light "we cannot say that the legislative history . . . is so persuasive . . ."[25] as to achieve the effect on the construction of Section 213 urged by the Commissioner.

Pertinent here is what was said in Acker v. Commissioner, 258 F.2d 568, 576 (6 Cir. 1958), aff'd 361 U.S. 87 (1959):

> "It seems to us a policy of first order that taxpayers under this 'government of laws and not of men' be entitled to expect that whenever the Congress intends to exact a penalty for a particular omission, this will be done by unequivocal language embodied in a statute regularly enacted conformably to the Constitution, *and not by a committee report that is neither voted on by the members of both Houses nor submitted to the President for his approval.*" (emphasis supplied).

We are aware, of course, as the foregoing indicates, that the Court in *Acker* was concerned with the construction of a penalty statute and that such statutes are strictly construed against the government. However, we are here dealing with a remedial statute which under the applicable rule is to be construed in favor of the taxpayer, so that what was said in *Acker* is pertinent here.

On the score of the Commissioner's attempt here to effect judicial amendment of the "medical expenses"

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[24] Witness the divergent views on the score of the legislative history of Section 213 in Carasso v. Commissioner, 34 T.C. —— (1960).

[25] Commissioner v. Acker, 361 U.S. 87, 93 (1959).

statute, what was said in Helvering v. Rebsamen Motors, Inc., 128 F.2d 584 (8 Cir. 1942) is likewise pertinent.

Said the Court in that case at page 588:

> "It seems to us, however, that neither the taxing authorities nor the courts are justified in virtually amending a taxing act because they are of the opinion that *Congress may have had* or should have had a different *intention* than that which was expressed in *the act*. There would seem to be nothing unreasonable in a rule of construction which requires legislative bodies, in enacting taxing statutes, to use language of sufficient clarity to be understood by an ordinarily intelligent taxpayer as well as by those who are required to administer and to interpret the statutes." (emphasis supplied).

We can find no better way to conclude our discussion of the Commissioner's petition for review than to quote what was said by Chief Justice Taney more than a century ago in United States v. The Heirs of Boisdore, *supra* at 122, on the score of statutory construction:

> "In expounding a statute, we must . . . *look to the provisions of the whole law, and to its object and policy.*" (emphasis supplied).

Looking "to the provisions of the whole law, and to its object and policy" here we cannot give to the construction of the "medical expense" statute a meaning that would preclude allowance of lodging and meals incurred in the course of travel "as a medical necessity and as a primary part of necessary medical treatment of a disease from which petitioner [taxpayer] was and still is suffering", as the Tax Court factually determined in the instant case.

If Congress had wanted to effect the limitation urged by the Commissioner "it would have been easy to have said so in express terms; and because it did not do so, we are led irresistibly to the conclusion that it did not intend . . ." to do so. Tillson v. United States, 100 U.S. 43, 46 (1879).

There remains for disposition taxpayer's petition for review of the Tax Court's limited allowance of his Florida apartment rentals.

It will be recalled that the Tax Court allowed taxpayer a deduction of only one-third of his rentals because of its view that "From the record we are unable to conclude that having his family in Florida with him was necessary as a part of the treatment of his disease." The Tax Court, as earlier stated, denied taxpayer's motion for leave to submit additional testimony on the score of the "medical necessity" of having his wife share his apartment with him. The motion was made subsequent to the filing of the Tax Court's Findings of Fact and Opinion but prior to the rendition of its Decision. It was accompanied by an affidavit of Dr. Irving S. Wright, taxpayer's heart specialist,[26] which stated in part:

> "I could not in good conscience have sent Mr. Bilder, or any patient who had a comparable history of multiple myocardial infarctions to Florida by himself for a period of months without his wife or a nurse to stay with him. I would most certainly have testified to this effect without qualification had the question been raised during my testimony."

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[26] In its Opinion the Tax Court described Dr. Wright as "one of the most eminent heart specialists in the United States, if not the world." The record discloses that he is a former president of the American Heart Association.

It must here be noted that in the Tax Court the Commissioner, as evidenced by his brief, premised his contention of non-deductibility of the expenditure for rent on his view that "An expenditure for rent is not within the term medical care as defined in the 1954 Code and cannot be deducted as a medical expense", and his disallowance of taxpayer's transportation costs to Florida, on the ground that it was not "primarily for and essential to medical care."

In connection with the foregoing it must also be said that at the trial in the Tax Court, the Commissioner's theory of his case was that taxpayer's travels to Florida and his stays there were not "for the treatment, prevention, alleviation or cure of any disease" and accordingly did not constitute "medical care". It may also be pointed out, in view of the Commissioner's position here (1) in not challenging the Tax Court's finding that taxpayer's travels to Florida were necessary as "medical care"; (2) in acquiescing in the allowance of taxpayer's transportation expenses to Florida as "medical care"; and (3) in confining his contention here to the non-allowability of rental deductions under the 1954 Code, the Commissioner, nevertheless in the Tax Court, via his counsel, stated that ". . . it would be inconsistent to allow him the transportation to Florida and not to allow him the rent, our position being that these trips to Florida were not necessary at all."

The statement referred to gives emphasis to our earlier characterization of the Commissioner's position as "inconsistent."

Be that as it may, the record discloses that attention was not specifically directed in the Tax Court to the issue of percentage allocations of taxpayer's rental payments in Florida. The Commissioner, indeed, states in his Reply Brief here "that, if this Court should hold that any part of the lodging expense is deductible, the

case should be remanded to the Tax Court to permit the taxpayer to present evidence that it was medically necessary for taxpayer's wife to accompany her husband to Florida during the periods involved and that she would not otherwise have done so."

In making this statement, the Commissioner, however, asserts that in any event "one-third of the rent allocated to the child's occupancy of the Florida apartment would not be deductible and the taxpayer does not contend that it was medically necessary for the child to be with her father in Florida."

On review of the record we see no compelling reason to remand to the Tax Court for a determination of the issue of the extent of the rental allocations.

We are of the opinion that the record as already made, affords sufficient basis for a fact-finding that it was a necessary part of the "medical care" of taxpayer that his wife and child should accompany him to Florida, and that in the interest of expeditious disposition of this litigation, and in view of its over-all remedial aspects, we should make that finding now.

Taxpayer, according to the Stipulation of Facts in the record, suffered four heart attacks—the first in March, 1946 while he was serving as a Lieutenant Commander in the United States Navy; the second in March, 1951; the third in December, 1952 and the fourth in April 1953; Dr. Wright, because "it had been noted that practically all of his [taxpayer's] attacks had occurred during the winter months", recommended that he winter in Florida "as a medical necessity" and as a "highly important part of his therapy"; taxpayer was a "hyperkinetic individual—under a good deal of inward stress and tension."

The record, as stated, affords ample basis for a factual finding that it was necessary to taxpayer's "medical care" to have his wife accompany him to Florida, and

stay with him there. We can take judicial notice of the fact that one who has had four heart attacks should not live alone, particularly when, as here, he is a hyperkinetic individual".

We can take judicial notice, too, of the anxieties which would afflict a father, concerned with the well-being of his three-year old daughter, should they be separated by distances as great as that between Florida and New Jersey (the home of taxpayer), and that the obviation of such anxieties was an imperative necessity here to the "medical care" of taxpayer because of the damaging effect their impact would have had on his mental and physical being, particularly in view of his "hyperkinetic" personality.

In making this finding we have taken into consideration the element that the presence of this three-year old child could have been of minimal consequence with respect to the amount of rental paid by taxpayer for his apartments. It is supported by the Tax Court's finding that "The record indicates that the cost of a hotel room for petitioner [taxpayer] alone during his stays in Florida during the years at issue would have exceeded the total rentals for the apartment in which he and his family lived . . ."

For the reasons stated the Decision of the Tax Court will be vacated and the cause remanded with directions to proceed in accordance with this opinion.

HASTIE, *Circuit Judge, dissenting.*

This decision is extraordinary in that the majority insist that a recent enactment of Congress means exactly the opposite of what the Senate and House Committee reports on the bill and such other statements as there are on the point in the legislative history say

it means. In fact, both committee reports anticipate the exact case which is before us and say explicitly that expenses for meals and lodgings are not deductible.

> "The deduction permitted for 'transportation primarily for and essential to medical care' clarifies existing law in that it specifically excludes deduction of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a patient must go to Florida in order to alleviate specific chronic ailments and to escape unfavorable climatic conditions which have proven injurious to the health of the taxpayer, and the travel is prescribed for reasons other than the general improvement of a patient's health, the cost of the patient's transportation to Florida would be deductilble but not his living expenses while there." H. REPT. No. 1137, 83d Cong. 2d Sess. at A60; S. REPT. No. 1622, 83d Cong. 2d Sess. at 219-220.

The House report is equally as explicit at another point:

> "A new definition of 'medical expenses' is provided which incorporates regulations under present law and also provides for the deduction of transportation expenses for travel prescribed for health, but not the ordinary living expenses incurred during such a trip." H. REPT. No. 1337, *supra,* at 30. See also S. REPT. No. 1622, *supra,* at 35.

When the proposed new tax legislation was being considered in the Senate committee, the Undersecretary of the Treasury, Marion B. Folsom, advised the committee that the new definition of medical care was intended to "permit deduction of cost of transportation necessary for health but not ordinary living expenses

incurred during trip." Hearings before Senate Finance Committe on H.R. 8300, 83d Cong. 2d Sess., part 1, p. 103. He added that this was one of the "principal [amendatory] provisions". In these circumstances, this is not a case in which the intention of Congress, as indicated by the legislative history, is in any way doubtful or ambiguous. It is plain that Congress was repeatedly advised by its responsible committees in charge of the legislation and by the executive department responsible for assisting in the presentation and explanation of tax legislation that the new definition of medical care was intended to preclude the deduction of living expenses during necessary absences from home for medical care.

If this plain intention of Congress is to be ignored, it must be because what Congress actually said in the statute is clearly contrary to what it meant. I think the majority recognize that this is their difficult task. I also think that analysis of the relevant legislation clearly shows that the language of the 1954 Code carries out the indicated legislative purpose to preclude the deduction of living expenses and does not in any way contradict it.

The fundamental mistake of the majority, which persists throughout their analysis and, in my view, invalidates it, is that they wholly ignore one of the two controlling sections of the 1954 Code. Specifically, the majority do not take into account the language of Section 262 of the 1954 Code which replaces Section 24 (a) (1) of the 1939 Code. Section 24 (a) (1) had provided that "in computing net income no deduction shall in any case be allowed in respect of—(1) personal, living, or family expenses, except extraordinary medical expenses deductible under Section 23 (x)...." Section 262 of the 1954 Code substituted for the old Section 24 (a)

(1) the following language: "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." Thus, Section 262 eliminates the former special reference to extraordinary medical expenses and provides instead that no deduction of living expenses whatever shall be allowed unless "expressly provided in this chapter". This means that, when a taxpayer asserts that living expenses during absences from home necessary for medical care are deductible under the 1954 Code, he must carry the burden imposed by Section 262 of pointing out where such living expenses are "expressly" included among the deductible items related to medical care. This cannot be done here because there simply is no such express provision.

The basic authorization of medical deductions, as it appears in Section 213 (a), is stated in general terms:

> "(a) Allowance of deduction.—There shall be allowed as a deduction the expenses paid during the taxable year . . . for medical care of the taxpayer. . . ."

Obviously this language does not "expressly provide" for any deduction of living expenses. Indeed, pages of the majority opinion are devoted to a reasoned argument to justify construing the general statutory reference to "expenses for medical care" as intended to include living expenses. To me such an argument only emphasizes the basic error. The very reason that elaboration is necessary is that Congress made no "express provision" for the deduction of living expenses.

Even if the decisive requirement of Section 262 were absent, I think Section 213 (e) indicates, as the Tax Court has recently held, that living expenses are not deductible. *Max Carasso*, 1960, 34 T.C. No. 119. I have already referred to the basic language of Section 213

(a) which in general terms allows a deduction for "expenses paid . . . for medical care . . ." Standing alone this language could be interpreted in various ways. It might mean only the cost of medication, medical services and the like. It could be interpreted to include maintenance of the sick in hospitals, at home or elsewhere. It could include travel for medical care or travel for convalescence. The point here is simply that the language is not precise or specific as to the situations it covers. It requires interpretation. Accordingly, Congress added the interpretative Section 213 (e) which reads:

> "(e) Definitions.—For purposes of this section—
>
> (1) The term 'medical care' means amounts paid—
>
> (A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance), or
>
> (B) for transportation primarily for and essential to medical care referred to in subparagraph (A)."

This definition says nothing about living expenses. The majority characterize this omission as "a slender reed" upon which to lean. But it is those who take the position that the statute authorizes a deduction of living expenses who require affirmative support for their position.

Section 213 (a) does not define expenses for medical care. Section 213 (e) purports to define the term and in so doing says nothing about living expenses. What the majority have to do is to construe the reference in Section 213 (e) (1) (A) to amounts paid for "diag-

nosis, cure, mitigation, treatment, or prevention of disease" as inferentially including living expenses on trips away from home which are necessitated by considerations of health. Of course it can sensibly be argued that such an inclusive interpretation should be given these words. There is precedent for that interpretation in the Tax Court's treatment of the general language of the 1939 Code. *L. Keever Stringham*, 1949, 12 T.C. 580, *aff'd per curiam*, 6th Cir. 1950, 183 F.2d 579. But, whether one agrees with that interpretation or not,[1] it is not obvious on the face of Section 213 of the 1954 Code. To the contrary, the separate specific provision of Section 213 (e) (1) (B) allowing a deduction of transportation expenses essential to medical care suggests that the immediately preceding language of Section 213 (e) (1) (A) is intended to include only those things which we conventionally describe as medical bills.

Since the face of the statute does not make either of the opposing constructions unreasonable, this is a case in which resort to legislative history is particularly appropriate. It has already been pointed out that the legislative history shows plainly that Congress did not intend to allow a deduction for living expenses.

In summary, I find the conclusion of the majority erroneous for two distinct reasons. First, Section 262 precludes the deduction of living expenses in the absence of any express provision therefor. There is no mention of living expenses in the section which, in the view of the majority, permits such a deduction. Second,

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[1] In the *Stringham* case itself three judges of the Tax Court dissented, believing that the general language of the 1939 Code did not cover living expenses. And the majority opinion in that case recognized that "this section is susceptible to a variety of conflicting interpretations" and necessitates an inquiry into legislative history and congressional intent. 12 T.C. at 583.

the conclusion of the majority is reached by giving Section 213 (a) a meaning that is not made obvious by a mere reading of that subsection and its definitional supplement, Section 213 (e). Therefore, it is proper to resort to legislative history which plainly shows that Congress intended that these provisions should preclude the deduction of living expenses. For these reasons, I think the decision of the Tax Court should be reversed and the deficiency determined without any deduction of living expenses.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13,293

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*

vs.

ROBERT M. AND SALLY L. BILDER, *Respondents*

No. 13,294

ROBERT M. AND SALLY L. BILDER, *Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

Present: MCLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby vacated, and the cause remanded with directions to proceed in accordance with the opinion of this Court.

Attest: IDA O. CRESKOFF, *Clerk.*

April 7, 1961

TAX COURT OF THE UNITED STATES

ROBERT M. BILDER AND SALLY L. BILDER, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 71548. Filed October 26, 1959.

The petitioner, a hyperkinetic person with an unusual inner stress and tension and who had suffered recurrent myocardial infarctions due to atherosclerotic heart disease was advised by his physician to spend the winter months in a warm climate. Pursuant to such advice the petitioner in 1954 and 1955 went from his home in New Jersey to Florida where he spent the winters. *Held*, that the petitioner's individual traveling expenses between his home and Florida and his individual housing expenses while in Florida were properly deductible as medical expenses under section 213, I.R.C. 1954. *Held, further*, that the housing expenses of the petitioner's wife and daughter who accompanied him to and remained with him while he was in Florida are nondeductible personal living expenses.

Martin D. Cohen, Esq., for the petitioners.
Chapman H. Belew, Esq., for the respondent.

WITHEY, *Judge:* For the years 1954 and 1955 the Commissioner determined deficiencies in the income tax reported by petitioners in the respective amounts of $450 and $281.90. By amended answer, respondent claims increased deficiencies in the respective amounts of $75.76 and $84.90. The issues for decision are (1) whether rental paid for a Florida apartment is a deductible medical expense and (2) whether transportation expense to Florida is a proper medical expense deduction.

FINDINGS OF FACT.

Some of the facts have been stipulated and are found accordingly.

Petitioners are husband and wife who reside in Mountainside, New Jersey, and filed their joint income tax returns for 1954 and 1955 with the district director of internal revenue at Newark, New Jersey. Hereinafter, unless otherwise indicated, petitioner has reference to the husband, Robert M. Bilder.

Petitioner was born March 14, 1911. He is a member of a Newark law firm. Since the age of 35 he has suffered four heart attacks each resulting in a myocardial infarction. That term means that muscular tissue of the heart has become necrotic due to a lack of sufficient blood circulation. The failure of blood to circulate through petitioner's heart muscle tissue was in each instance the result of a coronary occlusion. That term means a closing or narrowing of an artery feeding blood to the heart tissue to such an extent that insufficient or no blood may pass to such tissue to nourish it. In petitioner's case, as is true generally, upon the occurrence of each such event other blood vessels already in existence and newly developed vessels gradually took over the burden of providing the blood supply for that portion of his heart muscle which remained alive and still functioning after each attack. Accepted as proper treatment by eminent heart specialists, at least in the United States, is the advice to such patients as petitioner that, if they live in a cold climate, they are to remain indoors or hospitalized during the winter months or, in the alternative, spend the winter months in a warm climate. The latter alternative advice was given petitioner by one of the most eminent heart specialists in the United States if not the world. This advice was given him because of his personality characteristics. He is and

was at the time the advice was given a hyperkinetic person with an unusual inner stress and tension. To confine him either at home or a hospital in the relatively cold climate of New Jersey throughout the winter months would have resulted in danger to his health from two sources. Such extended inactivity would have increased his inner stress and tension, which are medically accepted as tending to cause the recurrence of heart attacks in one who has previously suffered one or more such incidents. Mild exercise of the type not available while confined to home or hospital is required for such a person and was for petitioner in order that new vascular passages for blood to the heart may more readily and quickly develop.

Subsequent to such advice, petitioner, his wife, and child traveled from their home in New Jersey to Fort Lauderdale, Florida, in December of 1953. From January 1, 1954, to March 24, 1954, they lived there in a rented apartment paying a total rent for the period of $1,500. Petitioner chose Fort Lauderdale and the apartment for the following reasons:

The specific disease from which petitioner suffers is atherosclerosis. The objective of the medical treatment accorded him was therefore the prevention of the clotting of his blood and the prescribing of Dicumerol, an anticoagulant drug, to that end. The objective of the advice given him as part of the treatment of his disease, concerning his conduct of his way of life, was that he should live under such conditions that he could obtain the proper exercise to the end that he might develop sufficient coronary blood vessel capacity to properly nourish what remains of his heart muscle tissue. The primary objective of all his treatment and the advice given incidental thereto was the prevention of any further myocardial infarction with resulting impairment

or destruction of the functioning of his heart, thus prolonging his life. Fort Lauderdale climate accords with this advice. Dicumerol, in 1953, was not widely used in the treatment of heart disease and relatively few doctors were competent to use it for that purpose. Because the drug prevents the natural tendency of human blood to clot, its use is attended by grave danger of hemorrhage unless doctors and hospitals competent to control the dosage and measure the level of the drug in the blood of the patient are readily available. One of the few doctors in Florida then competent to supervise petitioner's use of the drug was in Fort Lauderdale. Petitioner's apartment was in close proximity to one of the few hospitals then able to test petitioner's blood to determine the correct dosage of Dicumerol. Petitioner has resided in Fort Lauderdale during the winter months each year since 1953 and has been under the care of the same doctor during those months of each year. The doctor examines petitioner at least weekly and upon occasion oftener when required in order to maintain the proper percentage of Dicumerol in his blood.

On December 15, 1954, petitioner and his family again returned to Fort Lauderdale and until February 10, 1955, lived in the same apartment at a rental for the period of $829. On the latter date petitioner and his family moved to a house he had purchased in that city. On April 15, 1955, they returned to Newark where petitioner resumed his law practice.

While in Florida during 1954 and 1955 petitioner taught school at a salary of $50 per week. During such periods, by agreement with other members of his Newark law firm, although he continued to share in its profits, petitioner forfeited a $150 weekly drawing account therefrom. The move to Florida each winter for such an extended period with its attendant disruption

of petitioner's Newark household and the necessity that their daughter be taken from one school and placed in another constituted a burden upon the family. Their sojourns in Fort Lauderdale during the years at issue were not vacations; they were taken as a medical necessity and as a primary part of necessary medical treatment of a disease from which petitioner was and still is suffering.

It is stipulated and found that the cost of petitioner's individual transportation from Fort Lauderdale to Newark and from Newark to Fort Lauderdale during 1954 was $250 and that the same cost was incurred by him during 1955 for like trips. On his income tax returns for the years at issue he deducted as "medical care" expenses both the rentals paid for the Florida apartment and $250 each year for transportation between Newark and Fort Lauderdale. Respondent has disallowed such deductions.

The necessary expenses of $500 and $277 for 1954 and 1955, respectively, for the individual housing of the petitioner in Fort Lauderdale and the transportation expenses of $250 of petitioner between Fort Lauderdale and Newark for each of the years at issue were incurred or paid by him for the mitigation and treatment of myocardial infarction, for the prevention of further such heart damage as a result of atherosclerosis from which he suffered during those years, and for the purpose of maintaining the proper function of his heart and constitute expenses incurred by petitioner for medical care and treatment.

OPINION.

If deductible, the deductions here involved are allowable under section 213 of the Internal Revenue Code of

1954, applicable portions of which are in the margin.[1] With the exception of its reference to the deductibility of transportation expense, the section is virtually identical with and expresses the same congressional intent as did section 23(x) of the Internal Revenue Code of 1939. *Frank S. Delp*, 30 T.C. 1230.

Respondent in effect argues that we wrongly decided the *Delp* case, because the congressional history, he contends, requires an opposite conclusion. In view of the clarity of the wording of section 213 of the 1954 Code, we see no reason to resort to congressional history for its meaning. We see no reason therefore to change the position we took with respect to its meaning as expressed in that case.

We have found as fact the factors which must control our ultimate decision of this case. The general criteria to be considered in resolution of this issue under section 23(x) of the 1939 Code were set forth in *Edward A. Havey*, 12 T.C. 409, and *L. Keever Stringham*, 12 T.C. 580, affd. 183 F. 2d 579 (C.A. 6, 1950). They are as follows: (1) What was the purpose of the taxpayer in making the expenditures sought to be taken as a medical expense deduction? (2) Would the expenditure

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[1] SEC. 213. MEDICAL, DENTAL, ETC., EXPENSES.

(a) ALLOWANCE OF DEDUCTIONS.—There shall be allowed as a deduction the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent (as defined in section 152)—

* * * * * * *

(e) DEFINITIONS.—For purposes of this section—

(1) The term "medical care" means amounts paid—

(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance), or

(B) for transportation primarily for and essential to medical care referred to in subparagraph (A).

have been made but for the advice of a physician? (3) Did the expenditure have direct relationship to the treatment of a specific disease? (4) Was the treatment reasonably designed to effect the diagnosis, cure, mitigation, or prevention of a specific disease or to affect any structure or function of the body? Because Congress has left virtually unchanged in section 213 of the 1954 Code the language it used in section 23(x) of the 1939 Code and because the last two cited cases long predate enactment of the 1954 Code, we use the same criteria for our decision here.

This record clearly supports a conclusion that the primary and only purpose for the housing and transportation expenses of petitioner here involved which were incurred by him was that he might so conduct his life, after four heart attacks with their resulting myocardial infarction, that he could develop sufficient additional blood vessel capacity to properly nourish and keep functioning such remaining heart muscle tissue as he still possessed while at the same time he might be so located as to have available proper medical supervision and hospital facilities that he might continue to maintain a safe blood level of the anticoagulant drug Dicumerol. The drug was taken because it tended to prevent the clotting of the blood passing through and into his heart. Its use was necessary because the specific disease from which petitioner suffered (atherosclerosis) causes a narrowing of the arteries leading to the heart, thus making it difficult or impossible for a blood clot to pass through them.

Would these expenditures have been made but for the advice a physician? We think not. Petitioner's repeated heart attacks with their convalescent periods seriously impaired his ability to earn a living at the law. During the period of their occurrence he was (against certain medical advice) attempting to reestab-

lish an active law practice in Newark after several years' absence while serving in the Armed Forces of the United States. He had a wife and school-age daughter who were living with him in Newark in a dwelling owned by them. Removing the daughter from school and enrolling her in another twice each year was to say the least undesirable. The disruption of their household for a period of about 4 months each year was distasteful to petitioner's wife. He was under the continuous care of a physician while in Florida and for the years at issue worked at teaching while there. His choice of State, city, and dwelling therein was we think dictated entirely by the advice of eminent medical authority. We have therefore found as a fact that his sojourns in Florida during the years involved were not vacations. It reasonably follows that his housing and transportation expenses would not have been incurred but for the advice of his physician.

We have adequately discussed above the relationship of petitioner's living during the winter months in Florida and his use of an anticoagulant drug with its hoped for mitigation of the effects of his prior heart attacks and the prevention of further such incidents. It is undisputed that since the beginning of such treatment he has experienced no further attacks. We find the treatment was designed to and did accomplish those ends.

Although respondent argues that the treatment here was not sufficiently proximate to the onset or recurrence of the disease from which petitioner suffers as to bear a relationship thereto, we think that argument falls of its own weight when it is considered that petitioner has, since sometime prior to his first attack, *always* suffered from atherosclerosis. Since the disease is not so symptomatic as to be brought to the awareness of an otherwise well layman, petitioner could not reasonably

have known of its existence in his body prior to his first heart attack and, since he has suffered from it at least since the first attack, there have been no recurrences. Under the instant facts we do not think this is an apt test of the deductibility of the expenses here involved.

Although we find that petitioner's individual living and traveling expenses while in Fort Lauderdale during the years at issue were properly deductible medical expenses under section 213 of the 1954 Code, the petitioner seeks deduction of the rentals paid for an apartment wherein not only he but his wife and child were housed. That portion thereof which represents the cost of housing his wife and child are nondeductible personal living expenses which we find must be eliminated from the total rentals paid. Inasmuch as petitioner seeks to deduct only his individual traveling expense, it appears to be inconsistent that he seeks to deduct the total rentals. The record indicates that the cost of a hotel room for petitioner alone during his stays in Florida during the years at issue would have exceeded the total rentals for the apartment in which he and his family lived, but it does not show the rental for his single occupancy of the apartment or other reasonably suitable living accommodations nor is it argued or shown that in the absence of his family petitioner would have necessarily occupied a hotel room. From the record we are unable to conclude that having his family in Florida with him was necessary as a part of the treatment of his disease. Under *Cohan* v. *Commissioner*, 39 F. 2d 540, we find that the proportion of the rentals deductible as the individual medical expense of petitioner was $500 for 1954 and $277 for 1955.

Decision will be entered under Rule 50.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 420—October Term, 1960.

(Argued June 20, 1961 Decided July 14, 1961.)

Docket No. 26817

MAX AND FANNIE CARASSO,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Before: CLARK and SMITH, *Circuit Judges*, and DAWSON, *District Judge*.

On petition for review of a decision of the Tax Court of the United States, Arnold Raum, *Judge*.

Affirmed.

DAWSON, *District Judge:*

This is an appeal from a Tax Court decision (34 T.C. 1139 (1960)) determining a deficiency in taxpayer's income tax for the year 1956. The deficiency arose as a result of disallowance by the Commissioner of certain claimed medical deductions, to wit: amounts spent for

food and lodging by petitioners while on a medical convalescence trip to Bermuda. The following facts, as set forth by the Tax Court, are undisputed by the parties:

Petitioners, husband and wife, reside in Brooklyn, New York, and filed their 1956 Federal joint income tax return with the District Director of Internal Revenue at Brooklyn.

In early February, 1956, while in Burlington, Vermont, on business for his employer, petitioner Max Carasso was stricken with a serious illness that resulted in two emergency operations, in which the major portion of his stomach was removed. He was hospitalized in Burlington, Vermont, during the period February 5, 1956, through February 22, 1956. He lost 50 pounds in weight. Upon being released from the hospital he was unable to go home because of his weakened condition, and remained at the house of some friends for a brief period, after which he finally returned to Brooklyn. However, his weakness persisted, and on March 6, 1956, on his doctor's recommendation he flew to Bermuda, accompanied by his wife, for further convalescence. He remained there for 9 days. Upon returning to Brooklyn he convalesced further for at least 6 more weeks, and when he thereafter returned to work, it was only on a part-time basis.

Included in the medical expenses claimed in the return was a total of $493.50 incurred in the Bermuda trip for both petitioner and his wife. These expenses were included in the amount of $628.50 disallowed by the Commissioner.

The Tax Court found the following facts:

The Bermuda trip was undertaken solely for medical reasons; it was in no sense a vacation trip. Petitioner's condition was such that he could not have made the trip alone, and his wife's presence and assistance were es-

sential. Many of the services performed by her were such as might have been performed by a nurse.

The $493.50 expenses incurred in connection with the Bermuda trip were composed of the following items:

Hotel	$108.00
Fare	217.80
Meals	162.00
Exit tax	5.70
	$493.50

The Tax Court disallowed the two items for "Hotel" and "Meals."

It is noted that the Tax Court found "the Bermuda trip was undertaken solely for medical reasons." There is no claim made that the trip was anything other than a medical necessity prescribed by taxpayer's physician.

The specific question before the court, therefore, is whether the expenses incurred by taxpayer for food and lodging during a trip concededly prescribed for medical reasons are properly deductible as medical expenses under the Internal Revenue Code of 1954.

Consideration of this question must start with reference to section 262 of the Internal Revenue Code of 1954 which provides:

> "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses."

Meals and lodging are certainly living expenses, and unless some other provision is made in the chapter for their deduction, obviously they may not be allowed. The taxpayer seeks to find this other provision in section 213 of the Internal Revenue Code of 1954 which allows deductions for "expenses for medical care."

This section defines medical care as meaning amounts paid

> "(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance), or
>
> (B) for transportation primarily for and essential to medical care referred to in subparagraph (A)." Internal Revenue Code of 1954, Sec. 213(e)(1).

Petitioners contend that under similar provisions in the Internal Revenue Code of 1939, both travel expenses and amounts spent for board and lodging incidental to a trip prescribed for medical reasons were deductible.

The previous Revenue Code had provided in section 24(a)(1) that

> "(a) GENERAL RULE.—In computing net income no deduction shall in any case be allowed in respect of—
>
> (1) Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23(x) * * * " Internal Revenue Code of 1939, Sec. 24(a)(1).

Section 23(x) of the Internal Revenue Code of 1939 contained essentially the same provisions as those found in section 213 of the Internal Revenue Code of 1954, except that it did not include the provision allowing a deduction "for transportation primarily for and essential to medical care." Although not specifically spelled out in the statute, the section was interpreted to include both travel expenses and amounts spent for food and lodging incidental to a trip necessary and

prescribed for medical reasons. *L. Keever Stringham*, 12 T. C. 580 (1949), *aff'd*, 183 F. 2d 579 (6th Cir. 1950); *Stanley D. Winderman*, 32 T. C. 1197 (1959). This view was confirmed in rulings published by the Commissioner. 1946-1 Cum. Bull. 75; 1955-1 Cum. Bull. 307.

When the Internal Revenue Code of 1954 was adopted the changes made by it were to eliminate the special reference to "extraordinary medical expenses" and to provide instead that no deduction for living expenses shall be allowed "unless expressly provided in this chapter"; and by the addition in the Internal Revenue Code of 1954 of the deductibility of transportation essential to medical care.

Do these changes in the statue indicate that Congress intended to change the rule previously applied? The language of the changes does not answer this question definitely, one way or the other. The court, therefore, may give consideration to the legislative history of the Revenue Code of 1954, to aid in an interpretation of these provisions.

The Committee Reports of both Houses, setting forth the lawmakers' intent and purpose, are extensive and directly on the point at issue. Both the House and Senate Reports (H. R. No. 1337, 83d Cong., 2d Sess., pp. 30, A60, 3 U. S. C. Cong. & Adm. News (1954) 4017, 4197; S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 35, 219-20, 3 U. S. C. Cong. & Adm. News (1954) 4621, 4855) state that the deduction for transportation expense

> "* * * specifically excludes deduction of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a patient must go to Florida in order to alleviate specific chronic ailments and to escape unfavorable climatic conditions which have proven

> injurious to the health of the taxpayer * * * the cost of the patient's transportation to Florida would be deductible but not his living expenses while there * * * "

The Senate Report further states:

> "A new definition of 'medical expenses' is provided which allows the deduction of only transportation expenses for travel prescribed for health, and not the ordinary living expenses incurred during such a trip." S. Rep. No. 1622, p. 35, 3 U. S. C. Cong. & Adm. News (1954) 4666.

Whatever latent uncertainty existed in the statute is dispelled by an examination of the Committee Reports cited above. It is abundantly clear that Congress intended, by changing section 213 of the 1954 Code, to prohibit deductions of the kind now at issue before us.

Our attention has been called to the recent decision in *C. I. R.* v. *Bilder*, 289 F. 2d 291 (3d Cir. 1961) which involved substantially similar facts and the identical legal issue presented by the case at bar. In that case, taxpayer, a New Jersey resident, suffering from a very serious cardiac condition was advised by his heart specialist to spend the winter months in a warm climate. Accordingly, he rented an apartment in Florida for a period of months in 1954-55 and listed the cost of the apartment as a deductible medical expense. The Commissioner disallowed the deduction and the case eventually came before the Third Circuit Court of Appeals. The majority held that the taxpayer was entitled to deduct amounts spent for lodgings, as well as transportation to and from Florida, as "medical expenses." A dissent was filed by Judge Hastie, in which he reviewed the language and history of sections 262 and 213 and came to the conclusion that money spent for lodging

during a medical trip was not authorized as a medical deduction. This court feels that the relevant statutes, and the legislative history surrounding them, support Judge Hastie's interpretation.

The decision of the Tax Court is affirmed.

TAX COURT OF THE UNITED STATES

MAX CARASSO AND FANNIE CARASSO, PETITIONERS, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 73590. Filed September 30, 1960.

Transportation expenses incurred in connection with trip to Bermuda by taxpayer for purpose of convalescence after two serious operations, upon physician's advice, *held* deductible as medical expenses. The trip was not undertaken for pleasure, but was made solely for medical reasons. However, amounts expended for meals and hotel in connection with such trip *held* not deductible. *Robert M. Bilder,* 33 T.C. 155, disapproved. Other medical expenses disallowed by respondent, *held* substantiated and deductible.

Max Carasso, pro se.
John Dunkel, Esq., for the respondent.

The Commissioner determined a deficiency in petitioners' income tax in the amount of $133.84 for the year 1956. The sole issue is whether he properly disallowed medical expenses in the amount of $628.50 out of a total of $2,367 claimed on petitioners' return.

Findings of fact and opinion were filed on June 29, 1960, but, on petitioners' motion for reconsideration, such findings of fact and opinion were withdrawn on July 15, 1960, for reconsideration.

FINDING OF FACT

Petitioners, husband and wife, reside in Brooklyn, New York, and filed their 1956 Federal joint income tax return with the district director of internal revenue at Brooklyn.

The husband, Max Carasso, hereinafter referred to as petitioner, was an employee of Abalene Pest Control Service, Inc. His work involved a considerable amount of travel.

In early February 1956, while in Burlington, Vermont, on business for his employer, petitioner was stricken with a serious illness that resulted in two emergency operations, in which the major portion of his stomach was removed. He was hospitalized at the Mary Fletcher Hospital in Burlington, Vermont, during the period February 5, 1956, through February 22, 1956. He lost 50 pounds in weight. Upon being released from the hospital he was unable to go home because of his weakened condition, and remained at the house of some friends for a brief period, when he finally returned to Brooklyn. However, his weakness persisted, and on March 6, 1956, on his doctor's recommendation he flew to Bermuda, accompanied by his wife, for further convalescence. He remained there for 9 days. Upon returning to Brooklyn, he convalesced further for at least 6 more weeks, and when he thereafter returned to work, it was only on a part-time basis.

Included in the medical expenses claimed in the return was a total of $493.50 incurred in the Bermuda trip for both petitioner and his wife. These expenses were included in the amount of $628.50 disallowed by

the Commissioner. The Bermuda trip was undertaken solely for medical reasons; it was in no sense a vacation trip. Petitioner's condition was such that he could not have made the trip alone, and his wife's presence and assistance were essential. Many of the services performed by her were such as might have been performed by a nurse. The $493.50 expenses incurred in connection with the Bermuda trip were composed of the following items:

Hotel	$108.00
Fare	217.80
Meals	162.00
Exit tax	5.70
	493.50

The remaining $135 disallowed by the Commissioner was not specifically identified by the Government, but petitioner in fact incurred all the medical expenses set forth in the return.

OPINION

RAUM, *Judge:* This case involves the disallowance of $628.50 of medical expenses out of a total of a considerably larger amount claimed by petitioner. This principal component of the amount disallowed is $493.50, actually spent on a 9-day trip for convalescence after two critical operations. The trip was taken on the advice of a physician. Petitioner was in a seriously weakened condition, and the presence of his wife, who accompanied him, was indispensable. It was in no sense a vacation trip, even in part. We think that this item was deductible, apart from the hotel and meals expenses which will be discussed separately hereinafter.

Trips to resort areas are naturally suspect when the expenses therefor are claimed as a medical deduction,

and we must carefully scrutinize the facts to make sure that the alleged medical reasons were not merely a pretext for a vacation trip. However, we are satisfied on this record that the trip in question was undertaken solely for medical reasons. Petitioners are quite obviously persons of comparatively modest means. Their reported adjusted gross income was $8,518.05, and their return showed no income from dividends, interest, rents, or the like. We have no doubt, that, but for the seriously weakened condition of the husband, the trip, followed by further convalescence at home prior to return to work, never would have been made. We hold that the expenses of the Bermuda trip, except for hotel and meals, are deductible.

As to the hotel and meals components, however, a 1954 legislative change affected the scope of the medical deduction so as to preclude the deduction of amounts expended for meals and lodging herein. In spelling out more fully the meaning of "medical care," section 213(e)(1) of the 1954 Code provided as follows:

> (1) The term "medical care" means amounts paid—
>
> (A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body * * *, or
>
> (B) for transportation primarily for and essential to medical care referred to in subparagraph (A).

This provision made clear that appropriate transportation costs were to be deductible, but by so limiting the deduction at the same time it raised the possible inference that other costs such as board and lodging were not be deductible. That such was the intention of Congress is made plain in the committee reports. Thus,

the House Ways and Means Committee report, commenting on this provision, declares (H. Rept. No. 1337, 83d Cong., 2d Sess., p. 30):

> A new definition of "medical expenses" is provided which incorporates regulations under present law and also provides for the deduction of transportation expenses for travel prescribed for health, *but not the ordinary living expenses incurred during such a trip.* [Italics supplied.]

And the same report, in its "Detailed Discussion of the Technical Provisions of the Bill," explicitly states (*Ibid.*, p. A60):

> The deduction permitted for "transportation primarily for and essential to medical care" clarifies existing law in that it specifically *excludes deduction of any meals and lodging while away from home* receiving medical treatment. For example, if a doctor prescribes that a patient must go to Florida in order to alleviate specific chronic ailments and to escape unfavorable climatic conditions which have proven injurious to the health of the taxpayer, and the travel is prescribed for reasons other than the general improvement of a patient's health, the cost of the patient's transportation to Florida would be deductible *but not his living expenses* while there. [Italics supplied.]

See also S. Rept. No. 1622, 83d Cong., 2d Sess., pp. 35, 219-220. Substantially the same thought appears in the regulations, section 1.213-1(e)(iv). Accordingly, we hold that the expenses of the Bermuda trip, exclusive of the hotel and meals item, are deductible. There is no showing that the meals and hotel item herein was proximately related to medical care, apart from its being included in the traveling expenses. We express no opinion as to whether meals and lodging

expenses might be deductible in other circumstances.

In a memorandum, accompanying petitioners' motion for reconsideration, the point is made, for the first time, that the Court could not examine the committee reports in construing the 1954 Code in relation to the hotel and meals item. Although there may have been support at one time for such a rigid limitation upon the interpretation of statutes (cf. *Caminetti* v. *United States*, 242 U.S. 470), it is now established beyond successful challenge that a court may seek out any reliable evidence as to legislative purpose regardless of whether the statutory language appears to be clear. *United States* v. *Amer. Trucking Ass'ns.*, 310 U.S. 534, 543-544; *United States* v. *Dickerson*, 310 U.S. 554, 562; *United States v. Rosenblum Truck Lines*, 315 U.S. 50, 55; *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479; *Cabell* v. *Markham*, 148 F. 2d 737, 739 (C.A. 2), affirmed 326 U.S. 404, 409; *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103, 106; *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 390-395, 399. Cf. also *Ozawa* v. *United States*, 260 U.S. 178, 194; *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 472. As the Supreme Court said in the *American Trucking* case (310 U.S. at 543-544):

> When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced

> by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion. * * *

To the extent that the Court in *Robert M. Bilder*, 33 T.C. 155, 158, failed to examine the foregoing legislative history, that decision is hereby disapproved.

As to the remaining item of $135 in controversy herein, the question is merely one of substantiation. The Commissioner did not indicate which of the numerous medical items composing the total amount claimed on the return was being disallowed. Such an adjustment, which respondent's counsel was unable to clarify even at the trial, put an unfair burden upon the petitioner. Nevertheless, at the Court's suggestion, the petitioner undertook to give evidence as to all of the items claimed on the return. Taking into account the fact that petitioner appeared on his own behalf, that he is not a lawyer, and that we were impressed with his candor and credibility, we find that he in fact incurred all of the expenses claimed, even though his testimony was at times loose and perhaps might not have been as convincing in other circumstances. Since no issue is raised as to this item apart from substantiation we hold that respondent erred in disallowing the deduction.

Reviewed by the Court.

Decision will be entered under Rule 50.

DRENNEN, *J.*, concurs in the result.

WITHEY, *J.*, dissenting: I dissent from the opinion of the majority in this case upon two grounds, only one of which I discuss herein. As to the other ground, I concur in the dissent of Judge Pierce filed herein. In *Robert M. Bilder*, 33 T.C. 155, we correctly determined that in allowing the deduction of the taxpayer's meals and lodging incurred in Florida, it was not proper to consider the congressional history of section 213(e)(1)(B) of the 1954 Code. It is axiomatic that where courts need aid in understanding *what Congress has said*, they should resort to the history of legislation. It is because Congress *had not spoken* in section 213 (e)(1)(B) upon the subject of meals and lodging but had spoken only on the deductibility of transportation expense that we did not feel called upon to resort to the history of that subparagraph of the statute. Congress had generally in subparagraph (A) of the section made the amounts paid for meals and lodging deductible when proximately related to the treatment, cure, or mitigation of a disease, but it has not, by the clear and unambiguous specific inclusion of transportation expense in subparagraph (B) among deductible medical expense, altered or amended subparagraph (A). The majority improperly seeks to fill a legislative void with the words of congressional committee reports which only by reading such reports as they do, appear to express an intent to exclude meals and lodging from deductible medical expense. This constitutes the grossest kind of judicial legislation. The reference to transportation expense in subparagraph (B) cannot by any stretch of the imagination be read to include the expense of meals and lodging incurred by a taxpayer while not being transported. Where Congress has in other legislation sought to cover both categories of expense, reference

has been made to "travel expense" not "transportation expense." Although one term may include the other they are not synonymous.

PIERCE, *J.*, dissenting: I think that the Court, in its opinion herein, has failed to meet squarely or deal adequately with the basic question here presented—which I regard to be a question of major importance, both to the Internal Revenue Service and to taxpayers generally. That question is: Whether expenses paid or incurred by a taxpayer *primarily for and essential to "convalescence" away from home,* following two major surgical operations, qualify for deduction as "expenses * * * for medical care," as defined in section 213(a)(1)(A) and (B) of the 1954 Code, and also as set forth in section 1.213 of the recently promulgated Income Tax Regulations pertaining to "medical care." More specifically, the question here is whether said statutory definition, in providing that "[t]he term 'medical care' means amounts paid—(A) for the * * * *cure, mitigation,* [or] *treatment* of disease * * * *or* (B) for *transportation* primarily for and essential to medical care referred to in subparagraph (A)" (Emphasis supplied.)—is sufficiently broad to comprehend expenses paid primarily for and essential to the "convalescence."

The specific items of convalescent expense involved in the instant case, are: In-transit "transportation" of the petitioner, to and from the place of convalescence; expenses for board and room, incurred by the petitioner in a "private establishment" (two hotels) where he resided for 9 days; and both the transportation and the board and room of the petitioner's wife, whose presence and assistance were found by the Court to be essential, and many of whose services were also found by the

Court to be similar to those which might have been provided by a "nurse."

The fact that the above-stated question is directly presented in the instant case, is evidenced by: The petitioner's return, in which he made claim to the deductions for "medical care"; by his petition to this Court, in which he assigned error in the denial of such deductions; by the Court's findings of fact, which disclose the seriousness of the illness and the indispensability of the wife's presence on the convalescence trip; and also by the Court's conclusions that the trip was undertaken solely for medical reasons, and was in no sense a vacation trip.

2. The inadequacy of the Court's opinion is, in my view, indicated by the following. The Court did not give sufficient consideration to the complete statutory definition of "medical care" contained in section 213(e). Indeed, it entirely ignored the application of subparagraph (A) thereof, which I believe contains the controlling provisions; and it relied solely on subparagraph (B) pertaining to "transportation," notwithstanding that this subparagraph is, by its own terms, specifically made dependent on the provisions of subparagraph (A). I find no warrant or justification whatever, for the Court's complete bypassing of the provisions of subparagraph (A), by employment of the statement: "There is no showing that the meals and hotel items herein were proximately related to medical care, apart from their being included in the travel expense." I believe that the application of subparagraph (A) is in no way dependent on subparagraph (B) which was added after the conjunction "or," that marks an alternative.

The Court rested its decision primarily upon two quotations from the report of one of the legislative committees—one of which quotations makes reference

only to "ordinary" living expenses; and the other of which quotations omits both the initial sentence and the final sentence of that paragraph of the report from which the quotation was taken.[1] I regard said final sentence to be of particular importance, because of the expanded meaning attributed to the committee report by the Treasury Department, in paragraphs (e)(ii), (iv), and (v) of the above-mentioned new regulations.

Furthermore, the Court made no reference whatever to paragraphs (e)(ii) and (e)(v) of the regulations, which contain provisions that relate specifically to the deductibility of "nurse's board," and also to "meals and lodging" in a hospital, or in "an institution other than a hospital," or in a "private establishment" which provides "care" similar to that obtainable in such institutions.

Said regulations provide in substance that whether expenses for care in such an "institution" or "private establishment" qualify for deduction as "medical care," is "*primarily a question of fact* which depends upon the *condition of the individual* and the *nature of the services he receives* (rather than the nature of the institution)." (Emphasis supplied.)

I think that the Court should have considered and applied the provisions of the new regulations, and also should have determined whether they are applicable to convalescent expenses. I also think that, since the Court allowed deduction for the *wife's transportation* on the convalescence trip, on the theory that she was an essential quasi-nurse, it should consistently have allowed deduction for *this quasi-nurse's board,* under sub-

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[1] The above-mentioned final sentence provides as follows: "The subsection is not intended otherwise to change the existing definition of medical care, to deny the cost of ordinary ambulance transportation nor to deny the cost of food or lodging provided as part of a hospital bill."

section (e)(ii) of the above-mentioned new regulations.

3. There are at least three cases in which it has been decided that medical deductions are allowable for board and room during convalescence in a private establishment away from home. *L. Keever Stringham,* 12 T.C. 580, reviewed by the Court, affd. 183 F. 2d 579 (C.A. 6); *Robert Bilder,* 33 T.C. 155, pending on appeal (C.A. 3); *Estate of Harry W. Embry* v. *Gray,* 145 F. Supp. 603 (W.D. Ky.), appeal dismissed on motion of appellant-district director 244 F. 2d 718 (C.A. 6).

The *Stringham* and *Embry* cases were decided under section 23(x) of the 1939 code, which contains a definition of "medical care," that is substantially identical to that incorporated in section 213(e)(1)(A) of the 1954 Code. The *Bilder* case, like the instant case, was decided by this Court under the 1954 Code; and as above noted, it is now pending on appeal before the Court of Appeals for the Third Circuit.

All of these cases are, in my view, either out of harmony or in conflict with the Court's decision in the instant case. Yet, the Court did not distinguish any of these cases; did not cite any of them except the *Bilder* case; and in the *Bilder* case, it referred only to what it regarded to be a procedural error of this Court, without in any way indicating that the result reached therein was incorrect.

The question involved in this and the above-cited cases is a narrow one; and we should not vacillate. I think that the answer to such question is sufficiently uncertain, that this Court should, as a matter of sound judicial procedure, have deferred issuance of its conflicting Opinion in the instant case until the Court of Appeals for the Third Circuit has rendered its decision in the *Bilder* case.

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